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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 359

ROBERT MIMS, *Petitioner*

v.

UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	22
Appendix	1a

CITATIONS

Cases:

Aviles v. U.S., 315 F.2d 186 (2d Cir. 1963)	15
Campbell v. U.S., 365 U.S. 85	14
Clancy v. U.S., 365 U.S. 312	11
Connally v. General Constr. Co., 269 U.S. 385	20
Howard v. U.S., 108 App. D.C. 38, 278 F.2d 872 (2d Cir. 1947)	11
Jorgensen v. York Ice Machinery Corp., 160 F.2d 432 (2d Cir. 1947)	9
Mattox v. U.S., 146 U.S. 140	8
Robinson v. California, 370 U.S. 660	22
Russell v. U.S., 369 U.S. 749	18
Ryan v. U.S., 191 F.2d 779 (D.C. Cir. 1951)	8
U.S. v. Capital Traction Co., 34 App. D.C. 592	20
U.S. v. Carll, 105 U.S. 611	17
U.S. v. Cruikshank, 92 U.S. 542	16
U.S. v. Flynn, 216 F.2d 354 (2d Cir. 1954)	8
U.S. v. Healy, 376 U.S. 75	20
U.S. v. McCarthy, 301 F.2d 796 (3d Cir. 1962)	11
U.S. v. Simmons, 96 U.S. 360	16
Wheaton v. U.S., 133 F.2d 522 (8th Cir. 1943)	8

Statutes:

28 U.S.C. § 1254(1)	2
49 U.S.C. § 1472(j)	2
18 U.S.C. § 3231	3
18 U.S.C. § 3500(e)(1)	11
18 U.S.C. § 1472(i)	21

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on June 9, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, No. 7401, is not yet officially reported; it is reproduced herein as Appendix A.

JURISDICTION

The Court of Appeals judgment was entered on June 9, 1964. Mr. Justice White entered an order on July 13, 1964 granting petitioner's motion for extension of time within which to file a petition for certiorari to

August 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Was petitioner denied his Sixth Amendment right to a fair trial by the misconduct of the marshal and bailiff during jury deliberations? Did the failure of the trial judge to inquire into the facts surrounding such misconduct, and to hold a full hearing on such question, deprive petitioner of his right to Due Process of Law under the Fifth Amendment?

2. Did the trial court err in not ruling upon and granting petitioner's tacit demand for production of a Government agent's report, which report was concededly within the purview of the Jencks Act, 18 U.S.C. § 3500?

3. Did the indictment satisfy the Sixth Amendment requirement that the accused be informed of the nature of the charges against him?

4. Is 49 U.S.C. § 1472(j) unconstitutional in that it is so vague, general and uncertain that it violates the Due Process Clause of the Fifth Amendment?

STATUTE INVOLVED

The statutory provision involved is the 1961 amendment to § 902 of the Federal Aviation Act of 1958, 75 Stat. 466, 49 U.S.C. § 1472(j) which states, in pertinent part:

> "(j) Whoever, while aboard an aircraft in flight in air commerce assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties, or lessen

the ability of such member or attendant to perform his duties, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. . . ."

STATEMENT OF THE CASE

Petitioner was indicted under 49 U.S.C. § 1472(j) and tried in the United States District Court for the Western District of Oklahoma. The District Court's jurisdiction was based upon 18 U.S.C. § 3231. He was convicted, fined $10,000 and sentenced to fifteen years.

On January 6, 1962, petitioner chartered a private four-seater, dual-controlled aircraft to fly him from Sioux City, Iowa to Dallas, Texas. He had flown from Sioux City to Dallas with the same charter company and the same pilot on December 21, 1961 (R51, 83)*. Petitioner sat in the right front seat behind a set of dual controls. Another employee of the charter company came along for the ride and sat in the rear seat.

In order to place the events which follow in perspective, it is necessary to note petitioner's physical condition at the time of the flight. His wife testified that petitioner was "drunk the whole time he was in Sioux City" (R91); the pilot, Schooley, testified that on January 3, 1962, Mims had chartered a flight to Dallas, but that when he went to pick him up at his hotel, he found petitioner to be "dead drunk," so the flight was cancelled (R51); Mrs. Mims testified that, on January 4, 1962, another employee of the same charter company had come to her mother's house in Sioux City to pick Mr. Mims up for a charter flight. He was

* R refers to the record abstract printed as appellant's appendix in the United States Court of Appeals for the Tenth Circuit, which appendix has been certified and filed with this petition as a part of the official record below.

passed out then and this flight, too, was cancelled (R51, 91); she testified further that she warned the charter company then that her husband was sick; that on January 6 the charter company called her and she told them then they should not fly Mims to Dallas under any circumstances (R92); Mims testified that on the day of the flight in question, he had been refused a seat on a Braniff Airlines flight just prior to coming to the charter company. He also testified that, after Braniff had turned him down, he consumed a pint of whiskey (R83); the pilot also had stated in an affidavit that during the flight petitioner's actions "were those of an irrational person, one who was 'crazy drunk' and did not know what he was doing" (R126); petitioner has in fact a serious history of alcoholism, a factor which figured significantly in the assessment of the excessive sentence by the trial court (R118-122).

After leaving Sioux City, the plane made a stop at Wichita, Kansas for refueling. While there, petitioner procured a fifth of vodka and two Seven-Ups. When the plane was aloft again, petitioner had the passenger fix him two drinks; he subsequently became ill and regurgitated (R54, 55).

A disagreement then developed between petitioner and the pilot over the proper compass heading for Dallas. Petitioner took over the controls briefly, attempting to set the plane on what he thought was the proper heading. The pilot brushed his hands away and maintained control of the plane (R44, 45). Petitioner had been a naval air ace in the second world war. He testified that on their previous flight together the same pilot allowed him to assume the controls for a brief period of time. The pilot denied this (R79, 48).

Thereafter, Mims became quiet and reclined in his seat, either napping or passed out (R56). He then

roused from his stupor, spit up again, and reached over and opened the door of the plane. There was considerable commotion in the cockpit over getting the door closed. The pilot decided to make an unscheduled stop at Stillwater, Oklahoma to close the door, since it is difficult to do such while the plane is in flight (R45, 46). Mims again lapsed into a stupor (R58).

When the plane got to within twenty feet of the runway, Mims again roused, only to see the ground rapidly coming up to meet him. About this time the pilot suddenly grabbed his head, evidently in great pain. He testified that he was suffering from a head cold and that the rapid descent caused him to have a severe earache. He had had two such attacks on previous occasions, one earlier in the present flight, and one during their previous flight together (R53, 59).

Petitioner, noting the pilot's condition and the runway approaching, reacted reflexively, as a trained, experienced pilot might predictably do, and grabbed the controls, pulling the plane up. Much confusion and commotion followed his action. The pilot told the passenger to let petitioner have it with a bottle, which command he followed, first by striking him in the head with a Seven-Up bottle, and then by pummeling him over the head with the nearly full vodka (fifth) bottle, using all the force he could muster in the limited swinging space. They were able to subdue petitioner in this manner (R47, 58, 59, 81).

After the pilot regained control of the plane, and when at an altitude of about four-hundred feet, Mims suddenly reached over, turned off the key, removed it from the ignition and placed it in his pocket. The pilot was forced to make a dead stick landing which he did, safely (R59).

REASONS FOR GRANTING THE WRIT

I

The Trial Court Erred in Not Undertaking an Investigation Into the Alleged Misconduct of the Marshal and Bailiff; the Failure of the Court to Take Affirmative Action Deprived Petitioner of Due Process of Law and Further Compounded the Harm Done by the Misconduct, Which of Itself Deprived Petitioner of a Fair Trial Guaranteed by the Sixth Amendment. This Court Should Redress These Prejudicial Errors by Reversal, Either on the Basis of the Deprivation of the Constitutional Rights, or on the Basis of the Court's Supervisory Power Over the Federal Court System.

The factual setting underlying the issue presented herein is as follows: petitioner's case went to the jury at 9:50 a.m. on April 9, 1963. During the noon recess (while at lunch) one of the jurors suffered a heart attack. The marshal and bailiff were fully informed of the juror's infirmity, as were the other jurors. However, instead of informing the court of the juror's serious disability, as they were bound by duty to do, they conducted the juror back to the jury room where he was given a thirty-minute period to recuperate.

Previous to the noon recess the incapacitated juror had, according to his own statement, informed his fellow jurors that he thought Mims innocent and that he would not sign a guilty verdict. At 2:35 p.m. of that same day the jury returned a guilty verdict, signed by all the jurors. The matter of the sickness was not then brought to the attention of the court or counsel, either by the marshal, the bailiff or by any of the jurors (R113).

On April 15, the day of sentencing, counsel for defendant was approached by the juror in question and informed of the events of April 9. He told him of his personal conviction that petitioner was not guilty

and that he only signed a guilty verdict in order to avoid a further heated argument that might be injurious to his health, and possibly even kill him. Defense counsel brought this to the court's attention that same day in open chambers with both counsel present. The judge summarily dismissed the incident, without inquiry of the marshal, the bailiff or the juror, with a "well, you have made your record" (R113). It appears further that during the sentencing proceeding, petitioner Mims brought the court's attention to the presence in the court room of the juror in question. The judge simply invoked the "no impeachment of a juror's verdict" rubric and dismissed the incident again (R117).

Petitioner respectfully submits that he was denied due process and a fair trial in the following respects. Having learned of the fact of the illness of the juror, and the failure of the officers of the court to report it, the trial court was under an affirmative duty to conduct an investigation into these occurrences, causing the marshal, the bailiff and the juror to be interrogated, in a recorded proceeding, and in the presence of counsel. Under the circumstances, nothing less would satisfy the requirements of due process. Further, without a full ventilation of the question of the illness of the juror, the effect such illness had upon his freedom of choice, and a resolution of all the other issues which might have developed at a hearing, it cannot be said that petitioner had a fair trial.

While there is an understandable lack of precedent on the precise question here presented, *i.e.*, the duty of the trial court to hold a full hearing where the misconduct of the marshal is brought to its attention *after* the close of the trial, there is precedent on the question of

misconduct *during* trial, holding that a duty devolves upon the trial court to hold a full hearing where the alleged misconduct casts suspicion upon the fairness of the trial.

In *Wheaton* v. *United States,* 133 F. 2d 522 (8th Cir. 1943) where the trial court failed to hold a hearing on appellant's motion, alleging misconduct of the bailiff in explaining to the deliberating jury the different counts in the indictment, the Court of Appeals reversed, directing the judge to "rehear the appellant's motion, and, after a rehearing, to determine whether a new trial should be granted . . ." *Id.* at 527.

This Court held, as long ago as 1892 in *Mattox* v. *United States,* 146 U.S. 140, that the misconduct of the bailiff in reading a newspaper article, prejudicial to the defendant, to the deliberating jury constituted reversible error. While the Court did not consider the question of the necessity of a hearing, it is apparent that had the lower court held such a hearing, the necessity for considerable subsequent litigation could have been obviated and the problem resolved in its inception.

A particularly helpful analogy regarding the duty of the trial court in a situation closely related to that under consideration can be found in the procedure utilized where, during the course of the trial, facts casting doubt upon a juror's impartiality come to light. In considering a question of this nature, the Second Circuit held that the procedure adopted by the trial court in conducting a full, reported investigation, under oath and with counsel present and allowed to examine all participants, was the approved manner of dealing with such questions. *United States* v. *Flynn,* 216 F.2d 354, 368 (2d Cir. 1954). See also, *Ryan* v. *United States,* 191 F. 2d 779 (D.C. Cir. 1951) where the

Court of Appeals applauded the action of the trial judge in conducting a careful hearing, under circumstances similar to those present in *Flynn*.

Petitioner respectfully submits that this Court should recognize a like duty in the trial court where the occurrence comes to light *after* the trial, but under circumstances, as present here, where the court can ascertain the truth of the matter with little inconvenience to itself or the parties involved. The fairness of petitioner's trial having been put in question by the revelation of the misconduct of the marshal and bailiff, and doubt cast upon the integrity of the verdict because of the juror's serious illness, due process would seem to demand that the court do something more than cavalierly report that "you have made your record."

Before leaving this question, it should be noted that both the trial court and the Court of Appeals ultimately dismissed this problem by taking refuge in the "no impeachment" rule. Petitioner submits that they both misconceived the issue. The question of impeachment, if there is in fact such a question present here, is ancillary to the misconduct and duty of the court issues. This is not a case of a matter within the personal consciousness of one juror or even of the jury panel itself; it is one of proper conduct of the jury proceedings. The circumstance which was sought to be demonstrated was extrinsic to the verdict itself. The sage pronouncement of Judge Learned Hand that,

> judges again and again repeat the consecrated rubric [jurors may not impeach their verdicts] which has confused the subject; it offers an easy escape from embarrassing choices . . . *Jorgensen v. York Ice Machinery Corp.*, 160 F. 2d 432 (2d. Cir. 1947), *cert. den.* 332 U.S. 764.

seems apropos the present situation. By centering their attention on the supposedly non-assailable impeachment of the juror's verdict question, the lower courts failed to meet the antecedent and crucial questions of the duty of the marshal and bailiff, and the failure of the trial court to take action. In so doing they may have avoided "embarrassing choices," but they also all but obscured petitioner's valid constitutional inquiries.

II

There is a Serious Conflict Between the Tenth Circuit and the District of Columbia Circuit on the Question of What Constitutes a Demand for a Statement Concededly Within the Purview of the Jencks Act, Which This Court Should Resolve on the Basis of its Supervisory Power Over the Federal Court System.

Petitioner's second point urged for reversal relates to the trial court's failure to recognize and pass upon defense counsel's (admittedly unorthodox) demand for production of statements under the Jencks Act. The colloquy giving rise to this assignment is as follows:

> Q. (Mr. Burger, Mims' counsel) But you do say the Government has a copy of that report?
>
> A. (F.B.I. Agent) As far as I know.
>
> Q. Do you have any objection—
>
> Mr. Parr: (Government's Counsel) (interposing) If the court please, I don't know what he is driving at. No question but we have a copy of the report. It's the only way I would know anything about the case.
>
> Q. (By Mr. Burger) Do you have any objection, Mr Drain (F.B.I. Agent) to my seeing the report?
>
> Mr. Parr: May it please the court, I object to that question. It is entirely incompetent, irrelevant and immaterial. Counsel knows that under Title 18, United States Code, Section 3500, he is entitled to a copy of a statement after a witness

testifies, the statement of the witness, but no statement has been taken in this case from this witness.

The Witness: Only the pertinent things to this case were recorded. The entire conversation wasn't recorded.

Q. (Mr. Burger) Do you have any objection to my seeing the pertinent things to this case?

Mr. Parr: May it please the court, I object to that question. That's improper cross examination (R74, 75).

Although it is apparent that there was confusion in the court room among all involved as to whether this report was producible under the Jencks Act, it is manifest from our vantage point of time that it was indeed producible under subsection (e)(1) as a signed written statement of the witness (agent). *Clancy* v. *United States,* 365 U.S. 312; *United States* v. *McCarthy,* 301 F. 2d 796 (3d Cir. 1962). The trial judge did not rule on the objection of Government counsel, nor did he inquire of defense counsel whether he was in fact making a demand. The Court of Appeals held that he had no duty to do so, absent some form of request (7a).

On the basis of the decision of the Court of Appeals for the District of Columbia in *Howard* v. *United States,* 108 U.S. App. D.C. 38, 278 F. 2d 872 (1960) on a like "demand" issue, it is apparent that there is a serious conflict between that court and the Tenth Circuit on this issue. In *Howard,* the question of demand stemmed from the following trial discussion:

Q. (By defense attorney) But you do have the statement and it is home. Is that correct?

A. (Officer) That is correct.

Q. May I see it?

(Assistant U.S. Attorney) He is not entitled to

look at this police report, your honor. I object to it. He knows better.

The Court: Sustained. *Id.* at 40 n. 6, 278 F. 2d at 874, n. 6.

The court held that,

> This contention [that there was no demand] is conclusively refuted by the record which clearly shows that *no ritual of words could make it any plainer that the defense wanted to see the officer's report.* *Id.* at 40, 278 F. 2d at 874. (Emphasis added.)

The only difference between the two cases is the fact that in *Howard* the court took action on the Government's objection and sustained it. Here, the court remained silent, even in the face of the objection by Government counsel. Certainly, if the statement of counsel in *Howard* was sufficient to constitute a demand, the tacit demand of petitioner's counsel in the instant case was sufficient to satisfy the requirements of the Act.

Even though petitioner maintains that his demand was sufficient in and of itself, there appears a further basis for substantiating his position, which was not present in *Howard.* In the instant case, petitioner had advised the court of his intention to invoke the protection of the Act as early as the pre-trial stage, when he made a motion for production of all Jencks Act statements *twenty-four hours before* the Government agent was to testify. In making his motion, petitioner clearly made a *demand* for the production of the statements, even if he had no authority to substantiate his right to have them in advance of the witness' testimony. Neither Government counsel nor the trial court questioned petitioner's right to make a demand at that time, but rather simply

pointed out that he was not entitled to their production until after the witness testified. Petitioner's counsel freely admitted he was aware of the fact that, under the law he had no right to the statements until after the witness testified, but noted that he was making the motion "to comply with the Jencks Act." The trial court made no ruling on the motion, but stated that,

> The court will give you ample time to read the statements. We will take a recess if it comes to that point, and you will have time to read it over (R28).

It is necessary to set forth the above in order to appreciate how fully apprised the trial judge was of petitioner's counsel's intention to procure the witness' report at trial. Not only did the court fail to rule on petitioner's tacit demand and the Government's objections, but it also failed to take action on its own deferred and still outstanding ruling on petitioner's pre-trial demand.

It should be noted that petitioner *had different counsel* at trial than during this pre-trial stage. Admittedly his counsel at trial would have obviated the problem here presented by a forthright demand at the proper moment. But, counsel for petitioner, unschooled in the subtleties of what is or is not a Jencks' report, was misled by the Government counsel's assertion that the report was not within the purview of the Act. While petitioner was certainly not bound by the Government's unilateral determination of what documents are producible under Jencks, his confusion and failure to make an explicit verbal demand is certainly understandable under such circumstances.

Production of this report was extremely important to petitioner's case. There were inconsistencies between the statements of the two Government agents, who had testified concerning what petitioner had said when they made their investigation (R100, 101). Further, petitioner's own testimony as to what he discussed with the agents stands in direct contradiction to their testimony (R82). When, as here, the Government's case rests upon the testimony of only one eye-witness (Swindler, the passenger, did not testify), the Government agent's testimony becomes especially crucial to petitioner's cause. Under such circumstances, petitioner should not have been denied his rightful opportunity to inspect the agent's report.

As this Court noted, in another setting, in the first *Campbell* decision, *Campbell* v. *United States*, 365 U.S. 85,

> [the statute] . . . implies the duty in the trial judge affirmatively to administer the statute in such a way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute— . . . *Id.* at 95.

This Court should recognize a duty in the trial court in circumstances such as are present here, to act as something more than a disinterested on-looker. The precise limits of the duty of the trial court need authoritative clarification by this Court. In view of the difficulties already facing defense counsel under the Act, the line should be drawn for greater liberality, in favor of the accused. The words of the Second Circuit are especially instructive on this point. After reciting

a litany of the problems confronting defense counsel in invoking the protection of the Act, the court stated that,

> To these impediments to an effective invocation of Jencks Act rights by defendants in criminal cases the Government would now add the niceties of ancient common law pleading in the formulation of demands for producible statements. Of course, the Act does not require that demands for statements must be of precise nicety, *and we are unwilling to hold that such requests be couched in formal or technical language. Aviles* v. *United States,* 315 F. 2d 186, 190 (2d Cir. 1963), *vacated sub nom* on other grounds, *Genovese* v. *United States,* 84 Sup. Ct. 24 (1963). (Emphasis added.)

III

This Court Should Grant Certiorari Because of the Deprivation of Petitioner's Sixth Amendment Right to be Informed of the Nature of the Charges Against Him, and in Order That it Might, on the Basis of its Supervisory Powers, Resolve the Confusion Among the Circuits on What Constitutes a Sufficient Indictment Where the Statute is Written in Generic Language, Where the Indictment Follows the Language of the Statute, and Where the Species of the Generic Act Is Not an Essential Element of the Offense.

Subsection (j) of Title 49 U.S.C. § 1472 proscribes in generic terms; specifically it speaks in terms of "assaults, intimidates, or threatens." It is evidently the intent of Congress that all species of assaults, intimidations, or threats occurring in flight which interfere with the performance by the flight crew member or flight attendant of his duties, or which lessen his ability to perform his duties, should be culpable under the Act.

Generally, as the Court of Appeals correctly noted, when a statute uses generic terms to define the offense,

the indictment based thereon must descend to particularize the species of the generic terminology. But, the court noted, where, as here, the species of assault, threat or intimidation is *not* an essential element of the offense, the government is not required to particularize in order for the indictment to be sufficient (2a, 3a).

However, where the indictment follows the generic statutory language, even though the species of the act is not an essential element of the offense, the indictment is still not sufficient, *unless* it apprises the defendant "with reasonable certainty, of the nature of the accusation against him . . . ." *United States* v. *Simmons*, 96 U.S. 360, 362. Petitioner respectfully submits that this indictment does not meet the test of "reasonable certainty" set out in *Simmons*, and that the lower courts erred in not dismissing it for insufficiency.

The vice in this indictment lies in the fact that a person who stands indicted under it has little more information than the words of the statute to inform him of the charges against him, or upon which to base the preparation of his defense (See Indictment, R3).

> In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature of and cause of the accusation.' *United States* v. *Cruikshank*, 92 U.S. 542, 557.

This Court ruled long ago that,

> In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, *unless those words of themselves fully, directly, and expressly without any uncertainty or ambiguity*, set forth all the elements necessary to constitute the offense intended to be punished; . . .

United States v. Carll, 105 U.S. 611, 612. (Emphasis added.)

Petitioner submits that the cryptically worded indictment returned against him does not meet this test. While the words of the indictment may set forth all the elements necessary to constitute the offense they do not "fully, directly, and expressly without any uncertainty or ambiguity," inform petitioner of the nature of the accusation against him. Petitioner reiterated throughout his testimony that he could not remember, due to his drunken condition, much of what had transpired; the pilot stated in his affidavit that during the flight petitioner was "crazy drunk" (R126). As broadly as the statute itself is worded, any number of words spoken or actions taken during the course of the flight might possibly be considered violations of the Act. With little personal knowledge of what had occurred, and with the utter paucity of information set forth in the indictment, how was petitioner to know what specific offense he was charged with, or how was he to adequately prepare a defense?

The trial court's answer in dismissing petitioner's motion for a bill of particulars that his attorney could "find out without much trouble from [his] client . . . what he did . . ." (R23) is no answer at all; in fact, it does violence to, and makes a mockery of, the historic principle in our criminal jurisprudence of the presumption of innocence. As this Court has repeatedly reiterated, ours is an accusatorial system of law, not an inquisitorial one, and especially not a "self-inquisitorial" one. Certainly the high principles of justice and fairness upon which our Constitution rests are not fulfilled if the Government can accuse an individual of

a crime in broad general terms and then tell him to look in his own heart and know why he stands accused.

In attempting to resolve the problem of how the accused is to be informed of the charge against him under this statute, the Court of Appeals stated that, although,

> we do not think it requisite to the validity of this indictment that the Government specify the particular overt acts employed to consummate the offense. . . . It may be that the accused is entitled to a specification of the manner or means by which the assault, intimidation, or threat were inflicted . . . (3a).

While this specification would ordinarily be supplied by a bill of particulars, the court noted that the denial of petitioner's motion to this effect was proper since he was in possession of an affidavit of the pilot, which made him "as well informed of the essential facts of the case against him as the Government" (4a). However, petitioner submits that the test is *not* whether the accused is as well informed as the Government; the test is whether or not the indictment is sufficient in law, and the indictment returned against petitioner standing on its own merits does not meet this test. Further, it is a well settled rule of law that a bill of particulars cannot save an invalid indictment. *Russell* v. *United States*, 369 U.S. 749, 770.

Even if an affidavit could in some manner fill the void created by an insufficient indictment, the affidavit in question here would certainly not add anything since its language stands in direct contradiction to that in the indictment! In the words of the affiant,

> At no time did Mims touch me. He did not threaten me, nor did he attempt physical contact with me or to force me to do anything.
>
> . . .
>
> He did not touch me or assault me . . . [he] did not threaten me with harm or in any other way (R126).

Petitioner was thus forced to go to trial without any real understanding of the nature of the Government charges against him, in contravention of his constitutional rights.

IV

This Court Should Cause the Writ to Issue Because of the Serious Question of the Constitutionality of 49 U.S.C. § 1472(j), and Because the Case Raises Important Questions of Federal Law Which Have Not Been, but Should be, Passed Upon and Settled by This Court.

It is not difficult to understand why the lower courts had so much trouble with the indictment in this case. It is for the simple reason that the statute is drawn in such a broad, general and vague manner that any sort of activity occurring in an airplane above the ground which (however remotely) smacks of an assault, intimidation, or threat, and which (however, innocuously) interferes with the conduct of the airplane, could be prosecuted and perhaps support a conviction up to twenty years in prison and a fine of $10,000.

Petitioner respectfully submits that there is serious question as to the constitutionality of 49 U.S.C. § 1472-(j). The subsection creates a new offense in our criminal jurisprudence; as this Court noted in *Connally* v. *General Constr. Co.*,

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. 269 U.S. 385, 391.

This Court has never passed upon the constitutionality of this subsection; indeed, it has never considered subsection (j) at all. It is apparent from the problems that the lower courts have had in interpreting and applying this statute, and from the plight of the petitioner himself, that the language needs authoritative interpretation. It is only through a full briefing and argument before this Court that these questions can be answered. The dividing line between what is lawful and unlawful may not be left to conjecture. *United States* v. *Capital Traction Co.*, 34 App. D.C. 592 (1910).

Finally, there is serious question whether Congress did in fact intend the proscriptions of subsection (j) to apply to private aircraft, and therefore to the actions of petitioner in the circumstances of this case. Although the Court of Appeals held, by a parity of reasoning from this Court's decision in *United States* v. *Healy*, 376 U.S. 75 that private aircraft were intended to fall within the purview of subsection (j), an analysis of the full legislative history will indicate that Congress did not consider private aircraft in anything but a "hijacking" context.

This Court correctly noted in *Healy* that the legislative history indicates that Congress intended the provisions of the Act to apply to all aircraft in commerce in a *hijacking* situation. Congress was concerned principally with the question of hijacking, which was the emotional stimulus to the legislation itself. It never considered the possibilities of the broad proscriptions of subsection (j) outside of a hijacking context.

However, by focusing attention on the hijacking issue, Congress failed to consider at all the problem of how the general language of subsection (j) might apply to the whole spectrum of aviation activities. Instead of including the proscription found in subsection (j) within the hijacking subsection (1472(i)) as the legislative history indicates was the intent of Congress, the drafters set it apart as an independent subsection, thus altering the emphasis from hijacking to *any* in-flight conduct. However, in so doing they failed to set out guidelines or standards to indicate just how far the proscriptions were intended to go. The legislative history provides no assistance, since it only shows Congress' concern with the hijacking problem. The language of subsection (j) itself is of no assistance, since it speaks in broad and general terms and, if anything, demonstrates that it was not intended to apply to private aircraft.

Further, if the subsection does in fact apply to private aircraft under all circumstances, the problems regarding due process enunciated, *supra*, are compounded, since the subsection does not take into consideration the manifestly different problems which may arise peculiar to the different modes of air travel. Is the subsection to be applied across the board in

the same manner to large commercial carriers, small charter flights, business flights in a company plane, private pleasure craft, etc.? If it is, what possible standard appears in the subsection which could reasonably be applied to all the divergent eventualities which might develop?

The subsection says nothing of intent; it does not define "interferes with," or "lessens the duties." Without burdening this Court with any more of the plethora of such questions which necessarily must arise upon consideration of the subsection, suffice it to say that Congress has simply failed to define the offense with sufficient precision, and has not set forth an ascertainable standard of guilt. Congress has cast its net too wide; the subsection is constitutionally deficient and justice demands this Court take curative action.

CONCLUSION

Petitioner comes before this Court having been accused of conduct not intended by Congress to be proscribed under the Act, indicted under an insufficient indictment, tried in a proceeding marked by denial of both substantive and procedural rights guaranteed to him by the Constitution, and convicted under a subsection of doubtful constitutionality. He faces imprisonment for fifteen years, not necessarily because of the culpability of his actions, but because he is sick and the trial court thinks that a long stint in prison will "rehabilitate" him and help "get the whiskey out of his system" (R122). *Cf. Robinson* v. *California*, 370 U.S. 660.

Now only this Court can begin to redress the errors that have gone before; your petitioner respectfully prays that this Court do so by causing the writ to issue.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM—1964

No. 7401

ROBERT MIMS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court for the Western District of Oklahoma

SAM W. MOORE and RAYMOND BURGER, for Appellant.

JACK R. PARR, Assistant United States Attorney (B. Andrew Potter, United States Attorney with him on Brief), for Appellee.

Before MURRAH, Chief Judge, and PICKETT and LEWIS, Circuit Judges.

MURRAH, Chief Judge.

This is an appeal from a judgment and sentence after conviction on an indictment charging that "while aboard an aircraft in flight in air commerce, to-wit: a 1960 Mooney Mark 20A four passenger single engine airplane * * * [Robert Mims] did assault, intimidate and threaten Royden Dudley Schooley, a flight crew member who was the pilot of said airplane, while said pilot was in fact in actual control of said airplane in the air above the ground, so as to interfere with the performance by said pilot of his duties in controlling said airplane * * * in violation of Title 49, U.S.C.A., Section 1472(j)." The 1961 Amendment to the Federal Aviation Act provides that "[w]hoever, while aboard an aircraft in flight in air commerce, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft * * *," shall be punished. 49 U.S.C., § 1472(j).

Appellant's first contention is to the effect that the statutory language in which the indictment is framed is too indefinite to include a private airplane. But, during the pendency of this appeal, this question was conclusively answered in United States v. Healy, 376 U.S. 75, 83, wherein the Supreme Court, in construing a companion section of the same statute (49 U.S.C., § 1472[i]), held that private aircraft are plainly included within the scope of "an aircraft in flight in air commerce." By the same parity of reasoning, the statutory phrase "flight crew member" clearly and unmistakeably includes the pilot of an aircraft in flight in air commerce.

Appellant also challenges the legal sufficiency of the indictment for failure to specify the acts constituting the alleged assault, threat, and intimidation. The traditional criteria by which the legal sufficiency of an indictment is determined is whether it contains the elements of the offense charged and apprises the accused of the nature of the charge, so as to enable him to prepare a defense and to plead the judgment in bar. See: Debrow v. United States, 346 U.S. 374; Russell v. United States, 369 U.S. 749; and Clay v. United States (10 CA), 326 F.2d 196. The essence of these high principles of due process is embodied in a simple rule, which provides that an indictment shall be "a plain, concise and definite written statement of the essential facts constituting the offense charged." F.R.Crim. P., Rule 7(c).

An indictment which is cast in the language of the statute is legally sufficient if, and only if, it states with requisite clarity the essential facts of the offense charged. See: Meer v. United States (10 CA), 235 F.2d 65; Cefalu v. United States (10 CA), 234 F.2d 532; and Madsen v. United States (10 CA), 165 F.2d 507. Generally, when the statute uses generic terms to define the offense, the indictment or information based thereon must descend to particularize the species of the generic terminology. See: Russell v.

United States, ibid; and United States v. Seegar, 303 F.2d 478. The statutory words, "assault, threat and intimidation" are, to be sure, generic terms in the criminal law. There are many species or classes of assault, threat and intimidation known to the criminal law, and an indictment or a statute which attempts to condemn or charge a violation of one of the species must allege the essential facts of the species charged. But, the species of assault, threat or intimidation is not an essential element of the offense charged here, and we do not think it requisite to the validity of this indictment that the Government specify the particular overt acts employed to consummate the offense. Our case is not like Russell v. United States, supra, where the indictment under 2 U.S.C., § 192 was fatally defective for failure to allege the subject matter of the congressional inquiry, as to which the question propounded was pertinent, or United States v. Seegar, supra, wherein the authority to inquire was deemed a material element of the offense. In each of these cases, the indictments failed to allege the essential facts of a basic element of the offense. It may be that the accused is entitled to a specification of the manner or means by which the assault, threat and intimidation were inflicted on the pilot of the plane, but the Government is not required to plead the factual details of the offense in the indictment. If such details are deemed necessary, in the discretion of the trial Court, to enable the accused to properly prepare his defense, they may be supplied by a bill of particulars under F.R.Crim.P., Rule 7(f).

At the pre-trial proceedings, appellant moved for a bill of particulars to spell out (a) in what manner he assaulted, intimidated and threatened the pilot; (b) how the assault, intimidation or threats interfered with the pilot's control of the airplane; and (c) by whose direction the plane landed at Stillwater. See: F.R.Crim.P., Rule 7(f). The trial Court denied the bill, saying that the indictment was "sufficiently clear," and that appellant's attorney could "find out without much trouble from [his] client * * * what he

did • • • ." Ordinarily, the accused does have knowledge of what he did, but he may be entitled to know and be informed of the overt acts on which the Government relies. This is especially true in our case, in view of appellant's claim to the Court at pre-trial that by reason of his drunken condition, he was unable to recall what transpired.

The record indicates, however, that when the motion was made, appellant was in possession of an affidavit of the pilot and complaining witness, in which he had stated that at the time of the events alleged in the indictment, the accused was riding in the right seat of the plane with a set of dual controls and pedals at his position; and, that while the pilot was attempting to land at Stillwater, Oklahoma and was about fifteen feet off the runway, the accused without warning assumed control of the plane by using the controls and by so doing, started to climb, saying "We're not going to land here." At this point, another passenger in the plane overpowered the accused, to permit the pilot to regain and maintain control of the plane by counteracting any action the accused had upon the controls. When the plane had reached an altitude of about 400 feet, the accused turned the ignition key off, removed it and put it in his pocket. The pilot stated that appellant did not touch him, threaten him, made no menacing gesture or attempt to force him to do anything; and, that his actions were those of one who was "crazy drunk" and did not know what he was doing. On the basis of this affidavit, the accused moved to dismiss the indictment on the ground that the complaining witness' testimony to the grand jury was factually insufficient to support the true bill. In that respect, the trial Court was invited to examine in camera the minutes of the grand jury, in order to ascertain the sufficiency of the testimony. In these circumstances, we think the accused was as well informed of the essential facts of the case against him as the Government. In any event, he cannot say as a practical matter, that he was not sufficiently advised of the nature of the charge or unable to

prepare to meet it. While the trial Court may have given the wrong reason for its denial of the bill of particulars, we think it was correctly denied.

Appellant attacks the sufficiency of the evidence to support the verdict. On trial of the case, the pilot as the complaining witness testified to substantially the same facts set forth in his affidavit with the additional facts that while aloft, the accused argued with the pilot concerning the proper compass heading for their destination and attempted to assume control of the plane by manipulating the dual controls. The pilot further testified that while in flight, the accused opened the door of the airplane, causing him to decide upon an immediate landing in Stillwater, Oklahoma instead of proceeding to their destination; that in order to subdue the accused and enable him to land, a third passenger in the plane hit the accused over the head with a bottle; and, that the removal of the ignition key by the accused forced him to make a "dead stick landing."

Two F.B.I. Agents testified concerning an interview with the accused several months after the incident. The accused told them that when the plane made a refueling stop at Wichita, Kansas, he bought some liquor and having consumed some of it, became dissatisfied with the manner in which the pilot was flying the plane and attempted to take over the controls; that he got into a scuffle and thought that someone hit him, knocking him out; and, that the next thing he knew, he was on the ground and in custody of the police. We think the evidence is entirely sufficient to support the verdict, based upon the Court's unchallenged definitions of the critical statutory words.

Relying upon the Jencks Act, 18 U.S.C., § 3500, appellant contends that the Court erroneously failed to require the Government to produce a memorandum report of its witness after his testimony. On cross-examination, one of the F.B.I. Agents further testified that the accused refused to make a written statement; that he had made notes during

the interview with the accused, from which a report was made and furnished to the United States Attorney's office; and, that he had used this report to refresh his memory prior to his testimony. It was against this background that the following exchange took place:

"Q. [Mr. Burger, Mims' counsel] But you do say the Government has a copy of that report?

A. [F.B.I. Agent] As far as I know.

Q. Do you have any objection—

Mr. Parr: [Government's counsel] (interposing) If the Court please, I don't know what he is driving at. No question but we have a copy of the report. It's the only way I would know anything about the case.

Q. (By Mr. Burger) Do you have any objection, Mr. Drain [F.B.I. Agent] to my seeing the report?

Mr. Parr: May it please the Court, I object to that question. It is entirely incompetent, irrelevant and immaterial. Counsel knows that under Title 18, United States Code, Section 3500, he is entitled to a copy of a statement after a witness testifies, the statement of the witness, but no statement has been taken in this case from this witness.

The witness: Only the pertinent things to this case were recorded. The entire conversation wasn't recorded.

Q. [Mr. Burger] Do you have any objection to my seeing the pertinent things to this case?

Mr. Parr: May it please the Court, I object to that question. That's improper cross examination."

The Court did not rule on the objections, and there is nothing in the record to indicate that the accused at any time or in any way requested the Court to require the Government or the witness to produce the report.

In presently pertinent part, the Jencks Act provides that after a witness called by the Government has testified on direct examination, the Court shall, on motion of the defendant, require the Government to produce any statement

of the witness in possession of the Government which relates to the subject matter of his testimony. 18 U.S.C., § 3500(b). Since the accused admittedly made no statement from which the Government's witness could have testified, the only statement involved is the memorandum report of the F.B.I. Agent. It is not entirely clear from the record whether the Government's objection to the interrogation of the witness concerning his report was based upon the contention that it was not "a statement" within the meaning of the Act. In any event, the Government now candidly concedes in its brief and at the bar of this Court that the memorandum report is "a statement" within the meaning of the Act, and producible upon demand by defense counsel. See: United States v. McCarthy, 301 F.2d 801. The Government simply says that no demand was made for the report, and the accused cannot, therefore, complain of it now. See: Harrison v. United States, 318 F.2d 220; and United States v. Paroutian, 319 F.2d 661. Appellant concedes the record in that regard, but insists that Government counsel's assertion to the effect that no statement had been taken from the witness was misleading and created the "illusion" that the report was immune from the Jencks Act; and further, that the Government and the Court knew that he intended to invoke the provisions of the statute, and that since no ritual of words is necessary, the Court was required to make appropriate inquiry and ruling in the circumstances. See: Howard v. United States, 278 F.2d 872; and Hilliard v. United States, 317 F.2d 151.

We are unwilling to impose any such duty upon the Court, in the absence of some form of request. True, counsel for the accused asked the witness if he objected to counsel seeing his report. But the question was not directed to the Court and cannot be construed as a request for the production of the statement. After all counsel—not the Court—was the cross-examiner and the strategist. And, it may well be that, practicing the art of cross-exam-

ination, counsel was content to rest with whatever psychological advantage he may have gained by the attitude of the Government's witness and counsel with respect to the production of the report. In any event, the Court was not asked to rule, it made no ruling, and committed no error in failing to do so.

Appellant also complains of the prejudicial remarks of the Court during the course of the trial. We have examined the record with care and find nothing therein to support the charge.

Finally, appellant complains of the misconduct of the bailiff and marshal, in failing to bring to the attention of the Court the fact that one of the jurors had suffered a "heart attack," after submission of the case and during deliberations. The matter was brought to the attention of the Court in this way: After verdict and in chambers, counsel for the accused stated for the record that after the verdict had been returned and the jury discharged, one of the jurors met him in the hallway and told him that during the lunch recess he had suffered a heart attack; that when the jury returned to the deliberating room and "with knowledge of the marshal and other jurors," the juror was given a thirty minute rest period before resuming deliberations; that "he signed the verdict because he was in fear of having consequences of the heart attack;" and, that he had advised the Foreman and other members of the jury prior to going to lunch that he had heard all the testimony and the Court's instructions, and was of the opinion that the defendant was not guilty, and that he was not going to sign the guilty verdict. Counsel then stated that he was bringing the matter to the Court's attention because he was surprised that the marshal had not told the Court "that there was a sick man in the jury room."

On the day of sentencing, the accused speaking for himself asserted that, "I would not have been pronounced guilty in your court, Sir, had not a man had a heart attack

at lunch. That man is in this courtroom now." The Court replied, "You know the rule on impeachment of a jury's verdict?" To which the accused answered, "Yes, Your Honor. I said what I felt. I am sorry if it was out of order." Appellant now seems to argue that the failure of the marshal and the other jurors to bring the matter of the juror's condition to the attention of the Court operates to vitiate the verdict.

If the trial Court had known of the illness or indisposition of one of the jurors, it would have undoubtedly made appropriate inquiry and taken such action as the circumstances seemed to indicate. It may also be assumed that a responsible marshal or bailiff, having knowledge of any such matters, should inform the Court; and, that the marshal did not do so in this case. But even so, we do not think his dereliction in this regard affected the integrity of the jury's verdict. The jury did resume its deliberations after lunch and a thirty minute rest period. The subject juror did not ask to communicate with the Court. The jury arrived at a verdict, returned it in open court, and was discharged without the subject juror having complained to the Court. In these circumstances, he may not be heard to impeach his own verdict. See: Young v. United States (10 CA), 163 F.2d 187; and Loney v. United States (10 CA), 151 F.2d 1.

The judgment is AFFIRMED.

Judgment

June 9, 1964

Before Honorable Alfred P. Murrah, Chief Judge, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Robert Mims, appellant, surrender himself to the custody of the United States Marshal for the Western District of Oklahoma, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	13

CITATIONS

Cases:

Boyce Motor Lines v. *United States*, 342 U.S. 337	7
Chaplinsky v. *New Hampshire*, 315 U.S. 568	7
Harrison v. *United States*, 318 F. 2d 220, certiorari denied, 377 U.S. 911	10
Howard v. *United States*, 278 F. 2d 872	10
Hyde v. *United States*, 225 U.S. 347	12
Mattox v. *United States*, 146 U.S. 140	12
McDonald v. *Pless*, 238 U.S. 264	12
Miller v. *Strahl*, 239 U.S. 426	7
Ogden v. *United States*, 303 F. 2d 724, certiorari denied, 376 U.S. 973	10
Russell v. *United States*, 369 U.S. 749	8
Ryan v. *United States*, 191 F. 2d 779	12
Stein v. *New York*, 346 U.S. 156	12
United Public Workers v. *Mitchell*, 330 U.S. 75	7
United States v. *Annunziato*, 293 F. 2d 373, certiorari denied, 368 U.S. 919	10
United States v. *Farley*, 292 F. 2d 789, certiorari denied, 369 U.S. 857	10

743-818—64——1

Cases—Continued	Page
United States v. *Flynn*, 216 F. 2d 354	12
United States v. *Harriss*, 347 U.S. 612	7
United States v. *Healy*, 376 U.S. 75	6
United States v. *Petrillo*, 332 U.S. 1	7
United States v. *Wurzbach*, 280 U.S. 396	7
Wheaton v. *United States*, 133 F. 2d 522	12
Statutes:	
Federal Aviation Act of 1958, Sec. 902, 72 Stat. 784, as amended, 49 U.S.C. (Supp. V) 1472	2, 3, 6
18 U.S.C. 3500	9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 359

ROBERT MIMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (A. 3 pp. 1–13;[1] Pet. App. 1–9) is reported at 332 F. 2d 944.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1964 (A. 4; Pet. App. 10). Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including August 8, 1964,

[1] "A." designates the blue-backed papers titled "Transcript of Record In the Supreme Court of the United States" on file with the Clerk of the Court. "R." refers to the transcript of record in the court of appeals which is also on file with the Clerk.

and the petition was filed on August 7, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 49 U.S.C. 1472(j) applies to private aircraft.

2. Whether 49 U.S.C. 1472(j) is unconstitutionally vague.

3. Whether the inuictment adequately informed petitioner of the charge against him.

4. Whether reversible error was committed because the trial court failed to turn over to defense counsel a statement of a government witness, producible under 18 U.S.C. 3500, where defense counsel did not request the court that it be produced.

5. Whether the trial court erred in failing to conduct a hearing concerning an alleged impropriety during the jury deliberations.

STATUTE INVOLVED

Section 902 of the Federal Aviation Act of 1958, 72 Stat. 784, as amended, 49 U.S.C. (Supp. V) 1472, provides in pertinent part:

> (j) *Interference with flight crew members or flight attendants.*
>
> Whoever, while aboard an aircraft in flight in air commerce, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties or lessen the ability of such member or attendant to perform his duties, shall be fined not more

> than $10,000 or imprisoned not more than twenty years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be imprisoned for any term of years or for life.

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted under a one-count indictment charging that, while aboard a chartered four-passenger single-engine airplane in flight in air commerce, he "did assault, intimidate and threaten Royden Dudley Schooley, a flight crew member who was the pilot of said airplane, while said pilot was in fact in actual control of said airplane in the air above the ground, so as to interfere with the performance by said pilot of his duties in controlling said airplane," in violation of 49 U.S.C. 1472(j) (R. 3, 11). Petitioner was sentenced to fifteen years' imprisonment and fined $10,000 (R. 12, 121).[2] The court of appeals unanimously affirmed (A. 3 pp. 1–13; Pet. App. 1–9).

The evidence showed that on January 6, 1962, petitioner chartered a single-engine, four-passenger airplane from Airways Service, Incorporated, for a flight from Sioux City, Iowa, to Dallas, Texas. The pilot sat in the left front seat, petitioner in the right front seat and Joe Swindler, a temporary employee of Air-

[2] In imposing sentence, the trial judge pointed out that the pre-sentence report showed that from 1953 to the date of sentencing petitioner had "difficulty with the Dallas Police Department no less than 34 times * * *" (R. 118).

ways Service, Incorporated, sat in the back seat of the airplane. The pilot, Royden Schooley, was the principal government witness.[1] Schooley testified that petitioner did not appear to be intoxicated when the plane left Sioux City (R. 40–43, 50, 63–64). The plane was first flown to Wichita, Kansas, where it made a 30-minute stop. Schooley did not see petitioner consume any liquor during the stopover, nor did he observe him carrying any liquor back to the plane (R. 42–44, 55). About ten minutes after the plane left Wichita, petitioner produced a bottle of liquor and consumed some of it (R. 44, 55–56). Subsequently, petitioner told Schooley that he was flying in the wrong direction for Dallas and, without Schooley's permission, seized the set of controls in front of him and tried to turn the plane in a different direction. After a struggle, Schooley and Swindler successfully forced petitioner to remove his hands from the controls (R. 45). Shortly thereafter, petitioner opened the door of the plane, and the others could not shut it (R. 45–46, 57–58). The pilot, noting that they were passing over Stillwater, Oklahoma, decided to land the plane at the local airport in that city (R. 46, 58). After the plane had made its approach and was about twenty feet from the ground, petitioner, saying "something about going on to Dal-

[1] The government requested a continuance since Swindler, who was on active duty overseas in the Air Force at the time the case was set for trial, could not be brought back to testify. Defense counsel objected on the ground that Swindler's testimony "would only be cumulative," and the court denied the government's request (R. 37, 35–38, 77).

las," again seized the controls and "froze on them" (R. 47, 58–59). While Schooley and Swindler were trying to remove petitioner from the controls, the plane rose to about 400 feet and lost air speed. Finally, Swindler hit petitioner with the whiskey bottle, thereby loosening his hold on the controls. After Schooley regained control of the plane, petitioner turned off the ignition switch and removed the key, which he placed in his pocket. Despite this, the pilot was able to make a safe "dead stick" landing (R. 47–48, 59–60, 69).

Two F.B.I. agents testified to an interview with petitioner on May 19, 1962.[4] Petitioner said that he was a pilot himself, and that he did not like the way Schooley, who seemed to have a headache, was flying the plane. He further said that after he decided to take over the controls of the aircraft, he engaged in a "scuffle" with the others aboard, became angry and "cut the switch on the airplane," and that he then was knocked out and did not remember anything until the plane landed (R. 70–73, 75–77).

Petitioner testified in his own defense that he was about "three-fourths drunk" when he boarded the aircraft in Sioux City, Iowa; that he drank additional liquor in the plane after it had left Wichita; and that he was asleep most of the trip. When he awoke, he saw the plane about twenty feet off the

[4] Petitioner was told that the agents were there to arrest him and that he did not have to make a statement. He said that as a lawyer he knew his rights (R. 72).

ground and the pilot holding his head; that he thought the pilot was sick, and he seized the controls in order to save his own life; and that the next thing he recalled was waking up in jail in Stillwater, Oklahoma. He denied making a statement to the F.B.I. agents about these incidents, claiming that he spoke to them only about football (R. 82, 78–90).

ARGUMENT

1. Petitioner's argument (Pet. 19–22) that a private aircraft is not within the purview of 49 U.S.C. 1472(j) is without merit. In *United States* v. *Healy*, 376 U.S. 75, this Court held that a companion provision of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472(i)), punishing aircraft piracy, covered private aircraft. There is no reason to believe that Congress meant Section 1472(j), which was part of the same body of legislation as Section 1472(i), to have any narrower compass. The safety of the airlanes requires that pilots of all craft, commercial or private, be free from harassment or intimidation during flight.

2. The statute is not unconstitutionally vague or indefinite. The words "assaults", "intimidates" and "threatens" have a well-understood meaning. Congress did not punish all assaults on crew members on an airplane in flight, but only those assaults or threats that "interfere with" or "lessen the ability" of a crew member "to perform his duties;" this limitation does not render the statute unconstitutionally vague and indefinite. The statute is at least as definite as lan-

guage in other statutes which this court has sustained.[5] The settled rule is that so long as the conduct involved in the particular case is definitely understood to be unlawful, it matters not that "there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls * * *." *United States* v. *Petrillo*, 332 U.S. 1, 7; *United States* v. *Harriss*, 347 U.S. 612, 618; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 103–104.

3. The indictment, which charged in the words of the statute, admittedly (see Pet. 17) set forth the elements of the offense. Nor is any claim made that it would not protect petitioner from a second prosecution for the same offense. The sole deficiency alleged is that the form of assault or intimidation was not specified. However, the fact that the assault or threat interfered with or lessened the ability of a specified crew member to perform his duties was clearly alleged in this indictment,[6] and no more specificity was needed to inform petitioner of the crime

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[5] See, *e.g.*, *United States* v. *Wurzbach*, 280 U.S. 396 (political purposes); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (any offensive, derisive word); *Boyce Motor Lines* v. *United States*, 342 U.S. 337 (practical and feasible); *Miller* v. *Strahl*, 239 U.S. 426 (to do all in one's power).

[6] The indictment charged that petitioner "did assault, intimidate and threaten Royden Dudley Schooley, a flight crew member who was the pilot of said airplane, while said pilot was in fact in actual control of said airplane in the air above the ground, so as to interfere with the performance by said pilot of his duties in controlling said airplane and greatly lessen the ability of said pilot to perform his duties while controlling said airplane, in violation of Title 49, U.S.C.A., Section 1472(j)" (R. 3).

with which he was charged. Petitioner's reliance on *Russell* v. *United States*, 369 U.S. 749, is misplaced. There the indictment, charging a refusal to respond to questions put by a Congressional subcommittee, was held insufficient because it did not identify the subject matter under inquiry by the subcommittee—an element which went to "the very core of criminality" (369 U.S. at 764). Here the element which went to the "core of criminality"—*i.e.*, the fact that the assault and intimidation interfered with the operation of the craft—was clearly spelled out. Moreover, as the court of appeals observed, seven months before trial petitioner knew from Schooley's affidavit what had allegedly occurred on the flight (Pet. App. 4–5). This affidavit was substantially similar to the witness's trial testimony. Compare R. 125–126, with R. 40–49, 67.

4. On cross-examination, F.B.I. agent Drain, who had testified to statements by petitioner at the time of his arrest, testified that during his conversation with petitioner he had made notes of what was said, but had not shown the notes to petitioner. The notes were shortly thereafter embodied in a report which he had examined before testifying and a copy of which was in the possession of the government (R. 74). The following then occurred (R. 74–75):

> Mr. PARR. [Assistant United States Attorney] (Interposing). If the Court please, I don't know what he is driving at. No question but we have a copy of the report. It's the only way I would know anything about the case.
>
> Q. (By Mr. BURGER) [Defense Counsel] Do you have any objection, Mr. Drain, to my seeing the report?

> Mr. PARR. May it please the Court, I object to that question. It is entirely incompetent, irrelevant and immaterial. Counsel knows that under Title 18, United States Code, Section 3500, he is entitled to a copy of a statement after a witness testifies, the statement of the witness, but no statement has been taken in this case from this witness.
>
> The WITNESS. Only the pertinent things to this case were recorded. The entire conversation wasn't recorded.
>
> Q. Do you have objection to my seeing the pertinent things to this case?
>
> Mr. PARR. May it please the Court, I object to that question. That's improper cross-examination.

Defense counsel addressed no request for production to the court and the court made no statement or ruling on the matter. The court of appeals, recognizing (as the government had conceded) that the report of the agent was a producible document under 18 U.S.C. 3500, held that no error had been committed by the district court since no request for production had been addressed to the court (Pet. App. 7–8).

Section 3500(b) provides in pertinent part that "[a]fter a witness called by the United States has testified on direct examination, the court shall, *on motion of the defendant*, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." (Emphasis added.) While

we agree that no particular form of words is necessary to constitute a demand for production, the court of appeals was correct in concluding that there had been no request whatever, in any form, for any ruling by the trial judge. Defense counsel only addressed a rhetorical inquiry to the witness, asking whether he would have any objection to counsel's seeing his report (R. 74–75). That no ruling of the court was sought or contemplated by this remark is confirmed by the fact that the court did not respond to it nor did defense counsel pursue the matter any further. The failure to request production could well have been deliberate, since petitioner ultimately denied that he made the statements attributed to him by the agent, and a written report, if produced in the presence of the jury, would have undermined his denial.[7] In these circumstances, petitioner cannot now be heard to complain that he was denied a document producible under 18 U.S.C. 3500. See *Ogden* v. *United States,* 303 F. 2d 724, 733 (C.A. 9), certiorari denied, 376 U.S. 973; *United States* v. *Farley,* 292 F. 2d 789, 792–793 (C.A. 2), certiorari denied, 369 U.S. 857; *United States* v. *Annunziato,* 293 F. 2d 373, 382 (C.A. 2), certiorari denied, 368 U.S. 919.

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[7] In *Howard* v. *United States,* 278 F. 2d 872 (C.A.D.C.), on which petitioner relies, the request of defense counsel for the document in issue—"May I see it?" (278 F. 2d at 874, n. 6)—was, to the understanding of the parties, directed to the judge and not to the witness. The District of Columbia Circuit has held that there can be no error resulting from a failure to produce Jencks Act statements without some form of request. See *Harrison* v. *United States,* 318 F. 2d 220, 221, certiorari denied, 377 U.S. 911.

5. On April 15, 1963, before sentencing and almost a week after the jury verdict of April 9, 1963, defense counsel stated to the trial judge that he had just been informed by one of the jurors that, during the noon recess while the jury was deliberating, the juror had suffered a heart attack; that the rest of the jury and the marshal knew of this attack; that the juror was given a 30-minute rest before deliberations began again; that prior to going to lunch he advised the foreman and the other members of the jury that he was of the opinion that petitioner was not guilty; and that he signed the jury vedict because he was in fear of his health after it became apparent that there would be additional argument during the deliberations (R. 112–113). Thereafter, at the sentencing proceeding, petitioner stated that he would not have been found guilty "had not a man had a heart attack at lunch. That man is in this courtroom now" (R. 117). The judge responded that he knew nothing about the circumstances except what counsel for the defense had previously told him, and that the juror's verdict "cannot now be impeached" (*ibid.*).

On these facts, petitioner now contends (Pet. 6–10) that the trial court was obliged to conduct a hearing at which the marshal, bailiff and the juror could have been interrogated to determine the true facts. We submit however, that if counsel seriously wished to challenge the validity of the verdict, the method chosen was totally inappropriate. No formal motion was presented; no affidavit by the juror was filed; there was not even a representation by counsel as to

whether he had asked the marshal or bailiff about what had occurred. In view of the fact that the juror in question had never sought to communicate with the court about his alleged illness, and had not raised any question at the time the verdict was entered in open court, counsel could not expect the court to act upon the hearsay statement regarding the juror's alleged illness and the circumstances of the verdict. This is particularly true in light of the general principle that a juror's testimony impeaching his own verdict is not to be accepted. *McDonald* v. *Pless*, 238 U.S. 264, 267–269; *Hyde* v. *United States*, 225 U.S. 347, 384; see *Stein* v. *New York*, 346 U.S. 156, 178.[8] In order to justify an exception to this rule, which might well have been appropriate on an adequate showing, petitioner's counsel should at least have offered the juror's affidavit and filed a formal motion for a new trial.

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[8] *Mattox* v. *United States*, 146 U.S. 140, and *Wheaton* v. *United States*, 133 F. 2d 522 (C.A. 8), relied upon by petitioner (Pet. 8), are inapposite. Unlike the instant case, they involved direct and flagrant interference by bailiffs with a deliberating jury. Similarly inapposite are *United States* v. *Flynn*, 216 F. 2d 354 (C.A. 2), which concerned allegedly improper statements by a juror to a third party stranger, and *Ryan* v. *United States*, 191 F. 2d 779 (C.A. D.C.), involving communications between government counsel and certain jurors during a recess in the trial. Moreover, in all these cases, the issue was formally presented by an appropriate motion.

6. The severity of a sentence (assuming that it is within legal limits) is not of course an issue on appeal. Nonetheless, we believe it appropriate to advise the Court that the Solicitor General has been concerned by the unusual severity of the jail sentence imposed in this case, and that he has discussed the matter with the United States Attorney for the District of Oklahoma. The explanation of the sentence, we believe, is that the district judge wished to impress most forcibly upon petitioner the extreme danger to life and limb attendant upon conduct of the kind in which he had engaged. We also have reason to believe that the district judge would now be receptive to a motion to reduce sentence (which petitioner may file at any time within sixty days of a denial of certiorari). The United States will support a very substantial modification of the sentence if such a motion is filed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 559

ROBERT MILLS, *Petitioner*

v.

UNITED STATES, *Respondent*

PETITIONER'S REPLY BRIEF

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CITATIONS

	Page
Harrison v. *U.S.*, 318 F. 2d 220 (D.C. Cir. 1963), cert. denied, 377 U.S. 911	8
Howard v. *U.S.*, 278 F. 2d 872 (D.C. Cir. 1960)	8
People v. *Von Badenthal*, 8 Cal. App. 2d 404, 48 P. 2d 82 (1935)	3
Rosenberg v. *U.S.*, 360 U.S. 367	7
United States v. *Flynn*, 216 F. 2d 354 (2d Cir. 1954)	5
United States v. *Healy*, 376 U.S. 75	9
STATUTES:	
18 U.S.C. § 3500(e)(1)	6
49 U.S.C. §§ 1472(i), (j)	9
MISCELLANEOUS:	
Annot., 84 A.L.R. 2d 1288	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 359

ROBERT MIMS, *Petitioner*

v.

UNITED STATES, *Respondent*.

PETITIONER'S REPLY BRIEF

The Government, in its brief in opposition, recognizes the unusual severity of the sentence imposed in this case and indicates its willingness to support a "very substantial modification of . . . [petitioner's] sentence" should the petition for certiorari be denied (Opp. 13). Petitioner appreciates this offer and acquiesces in the Government's desire to see the substantial wrong done this petitioner rectified.

However, the form of the Government's proposal obscures more fundamental inquiries which necessarily must precede any consideration of a reduction in sentence, *i.e.*, did this petitioner receive a fair trial, or was he denied due process and, even more fundamentally, should this petitioner have been so much as exposed to being sentenced at all? The questions raised in this petition for certiorari touch not only the interests of this petitioner—they relate also to im-

portant questions of substance and procedure which could affect our whole judicial system. What is equally important, they are presented in this case in a posture which makes them ripe for determination. This Court should cause the writ to issue so that these important questions might be settled.

Although acquiescing in the Government's proposal for a reduction in sentence, petitioner specifically takes issue with the following points raised in the brief in opposition.

1. The Government has chosen to relegate to the end of its brief (Opp. 11) consideration of the question of the serious illness of the juror and the failure of the trial court to take remedial action. However, in reply, petitioner will treat this question first, as was done in the petition (Pet. 6), since petitioner considers it to be of prime importance and worthy of the closest scrutiny by this Court.

The brief in opposition ignores the specific issue raised by petitioner regarding the jury question. Simply stated, the question presented is this: what duty, consistent with the demands of due process, devolves upon a federal trial court judge in the circumstances present in this case? The correlative inquiry is, manifestly, did the court meet and discharge this duty; but the key question, and the one which demands authoritative interpretation by this Court, is the plain and forthright standard-of-duty question.

As petitioner argued in the petition for certiorari (Pet. 6-9), there is no precedent on this precise question in federal law; in closely analogous situations, federal courts have recognized a duty in the trial court to conduct such a hearing (Pet. 8-9). It appears further that state courts would require affirmative action

on the part of the trial court judge under closely allied circumstances.[1] Certainly, no less requirement should be demanded of the federal courts. Finally, plain common sense and the dictates of fair play would require *at least* the holding of a hearing by the trial court when a question of the serious illness of a juror during the jury deliberations is raised, no matter when the fact comes to light.

In addition to misconstruing the thrust of petitioner's argument,[2] the brief in opposition faults peti-

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[1] See, e.g., *People* v. *Von Badenthal*, 8 Cal. App. 2d 404, 48 P.2d 82 (1935) where, in a factual setting closely analogous to ours, a woman juror became ill at the dinner table, fainted, and was found by a physician to have suffered a heart attack induced by acute indigestion. The trial court held a hearing after discovering the illness, causing the jury to be brought back into the courtroom along with the defendant, counsel, and the attending physician. The trial court dismissed the juror on the basis of the evidence adduced at the hearing, including testimony of the physician that the woman was highly nervous and hysterical and that she could not perform the duties of a juror. See generally, Annot., 84 A.L.R.2d 1288, 1304, 1309-11 (1962), for discussion of state statutes designed to obviate the problems arising upon the serious illness of a juror, providing for a hearing by the trial judge and substitution of an alternate juror.

[2] The Government attempts to distinguish cases cited by petitioner as authority for the proposition that the trial court has a duty to hold a hearing, by arguing that "Unlike the instant case, they [petitioner's authorities] involved direct and flagrant interference by bailiffs with a deliberating jury" (Opp. 12, n. 8). Petitioner grants that the factual stimuli prompting the hearing by the court differs in the cases cited—the point which remains unrefuted, and the purpose for which petitioner cited such authorities, is that the courts in these other closely analogous situations *caused a hearing to be held*. Further, the dereliction of duty by the marshal and bailiff here is just as flagrant an interference with the jury deliberations as that of the court officers in the cases cited.

tioner for not taking certain procedural steps at the time of the disclosure of the illness (Opp. 11-12). Petitioner's counsel did not learn of the illness until he was on the way into the courtroom for the sentencing proceedings (R. 113); he immediately informed the judge of all that he knew concerning the matter. While it is easy for the Government to second-guess the tactics of defense counsel from this vantage point, it must be perfectly plain on the record, without resort to such conjecture why petitioner's counsel did not adamantly press the court for action at that time. Debate with the trial judge over his handling of a question of this sort immediately prior to the sentencing of petitioner would not appear the better part of prudence, especially in view of the trial court's handling of previous requests by petitioner's counsel during the trial.[3]

This factor only points up more dramatically the necessity for an authoritative explication of the trial court's duty when such facts become known at the sentencing proceedings. If the trial court is left free to dismiss the whole thing cavalierly, and counsel is hesitant to press his demand for fear of a possible increase in sentence by an antagonized judge, what happens to the interests of the defendant? There is no need to put defense counsel and the interests of the defendant to such a choice. This Court, on the basis of its supervisory power over the federal court system, should authoritatively explicate what the duty of the trial judge is under circumstances such as are present here, thereby answering this question once and for all. Peti-

[3] One of the points relied upon for reversal in the Court of Appeals was that the prejudice of the trial judge, manifested by certain rulings made by him, prevented petitioner from having a fair and impartial trial.

tioner respectfully submits that this duty and the demands of due process can be satisfied only by a requirement that the trial court conduct a full reported hearing, under oath and with both counsel present and allowed to examine all participants. See *United States* v. *Flynn,* 216 F.2d 354, 368 (2d Cir. 1954) (Pet. 8), wherein the duty to hold such a hearing was recognized under circumstances closely akin to those present here. In *Flynn* the question went to the impartiality of a juror. In this case the juror was in fear for his life, a condition which certainly raises a question as to his then impartiality, or ability to make a free choice.

The Government also avers to the fact, as did the Court of Appeals, that the juror who suffered the heart attack had "never sought to communicate with the court about his alleged illness, and had not raised any question at the time the verdict was entered in open court . . ." (Opp. 12; Pet. 9a). As to the first point, the juror *did* communicate with the court; the bailiff and marshal, *officers of the court,* were both fully advised of his condition; this would have been of more than passing significance had they fulfilled their duty and communicated this fact to the court, or had the trial judge bothered to make inquiry at the time it was brought to his attention.

As to the second point, petitioner finds it difficult to comprehend that the Government here, or the Court of Appeals below could seriously argue that the juror should not have been allowed to "impeach" his verdict after the trial, since he did not object to the verdict in court and communicate the fact of his illness at that time. It would be most difficult, as well as improbable for a man who had just suffered a heart seizure to have to stand up in court and deny that the ver-

dict was his; his natural inclination would be to *avoid* controversy, (which would certainly have followed upon such a communication) and passively to acquiesce, in order to escape quickly from the pressures of the courtroom.

2. The Government argues that petitioner's counsel's "rhetorical inquiry to the witness" did not constitute sufficient demand for the Jencks Act report at issue in this case (Opp. 10). While it may be that the question was *directed to* the witness, counsel was, in effect, seeking a ruling from the trial court by his question, even though he did not specifically articulate a *motion* to the court for production of the report. The question for determination here, then, taking into consideration the purposes underlying the Jencks Act and the problems already facing defense counsel in invoking its protection, is whether this is enough to constitute a "demand."

In considering this question, the Government's brief obscures two important points made by petitioner. First: the manifest confusion in the courtroom over the question of whether the document was producible. Counsel for petitioner was obviously misled by the Government attorney's adamant assertion that the report was *not* producible under the act; further, the court made no ruling even when the Government attorney objected to defense counsel's demand. The fact that the Government attorney objected to petitioner's tacit demand, and the manner of the objection indicates that *he* at least thought the request directed to the court.

Second: the Government completely ignores the fact of the trial court's awareness of petitioner's previously communicated desire to see this report (Pet. 12-13). This awareness, coupled with defense counsel's

manifested desire to see the report, plus the objection by the Government attorney, demonstrates the ineffectiveness of the court's administration of the statute in this case.

The Government, once again in emulation of the Court of Appeals, finally dismisses the Jencks Act question with a gratuitous imputation of "trial tactics" to defense counsel, *i.e.*, that he did not press the point because he was content with whatever psychological advantage he could gain because of the attitude of the Government's witness, or because he feared that if the document were actually produced, this might have undermined petitioner's own denial that he made the statements (Opp. 10; Pet. 7a).

This Court has admonished against courts substituting their judgment as to trial strategy for that of defense counsel, *e.g.*, in considering the question of whether a defense counsel could have effectively used a Jencks Act statement which was denied to him at the trial. *Rosenberg* v. *United States*, 360 U.S. 367, 376 (dissenting opinion). The admonition in that case would seem equally apropos here. For the Government or the Court of Appeals to attempt to impute to defense counsel the motives implicit in the "trial tactics" argument is to pretend to knowledge they cannot possibly have—and conjecture is not enough.

A more reasonable explanation for defense counsel's failure to press the demand is that suggested by a fair reading of the colloquy, considered in the context of the trial court setting. Such a reading reflects that counsel was not schooled in the subtleties of what is or is not a Jencks Act statement, that the Government attorney adamantly asserted that he had no right to it and thereby misled defense counsel, and finally, the

court's silence gave the Government attorney's assertion at least tacit approbation thus creating the impression in the mind of defense counsel that he had no right to the statement. Petitioner reasserts its argument made in the petition—this tacit demand was enough to satisfy the requirements of the statute and should be given effect as such. It does not serve the administration of justice generally, nor the interest of this petitioner particularly, to apply this act in such an illiberal manner. A mere failure of defense counsel to word his request in technical language in making a demand for a statement under the Jencks Act, amounting to no more than an exercise in semantics, should not prejudice the substantial rights of this petitioner.

It should be noted also that the Government argues (Opp. 10, n. 7) that the question, "May I see it?" made by defense counsel in *Howard* v. *United States*, 278 F.2d 872 (D.C. Cir. 1960), upon which petitioner relies, was addressed to the court and not the witness, thereby attempting to distinguish it from our case. Petitioner respectfully submits that this assertion is *nowhere* substantiated in the reported opinion, that the opinion and the colloquy reflect that it was addressed *to the witness* (Pet. 11), and that any knowledge the Government purports to possess on this point outside of what is reported is hearsay in the classic sense and should be ignored as such. The conflict between *Howard* and this case does in fact exist, as a simple juxtaposition of the language from the two cases demonstrates. (Compare Pet. 10 with Pet. 11.)

Further, the Government's reliance on *Harrison* v. *United States*, 318 F.2d 220 (D.C. Cir. 1963), cert. denied, 377 U.S. 911 (Opp. 10, n. 7) is misplaced, since the defense counsel there specifically *declined* any in-

terest in seeing the notes in question. *Harrison*, in fact, is authority for petitioner's argument that the Court has an affirmative duty to take action under these circumstances, since the court there *directed a specific inquiry to the defense counsel*, asking him if he wanted to see the notes.[4]

3. The Government relies on *United States* v. *Healy*, 376 U.S. 75, as authority for the proposition that private aircraft were intended by Congress to come within the proscription of 49 U.S.C. 1472(j), since this Court in *Healy*, construing the companion hijacking section, found that Congress intended private aircraft to fall within the ambit of that section. The only authority that the Government alludes to in support of its contention is the statement that "There is no reason to believe that Congress meant Section 1472(j), which was part of the same body of legislation as Section 1472(i), to have any narrower compass" (Opp. 5).

Petitioner submits that, on the basis of a full reading of the legislative history, there is *every* reason to believe that Congress did not so intend. (See Pet. 19-22.) Nowhere in the hearing or debates does Congress once consider the question of "assaults, intimidates or threatens" in anything but a hijacking context. Petitioner's argument is not with the application of Section 1472(j) to hijacking situations; it is, rather, that when applied *outside* a hijacking context, *e.g.*, in a situation such as we have present here, that it is applied in a manner *not intended* by Congress.

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[4] The Court: I do not want to examine them. Do you want to examine them Mr. Garbis?

Mr. Garbis [appellant's counsel]: No. Mr. Murphy's word is good enough for me, Your Honor.

The Court: All right. Id. at 221.

The Government further argues that the statute is not unconstitutionally vague or indefinite, because the conduct involved in this particular case is "definitely understood to be unlawful" (Opp. 7). But, is it? Considering for a moment the first alleged act of interference with the performance of the pilot's duties by the petitioner: This was not a hijacking situation. Petitioner chartered this plane and hired this pilot to fly him to a destination chosen by petitioner. He was an experienced pilot—he had flown with this same pilot previously, and testified that the pilot had let him handle the controls. The taking over of the controls (which virtually rested in his lap) to change the compass heading, in a plane whose destination he controlled, is at best an ambiguous act legally. However, under a literal application of the language of this act, such conduct could be held unlawful, since in some degree petitioner had interfered with the ability of his hired pilot to perform his duties. Conceivably, this could be construed as a form of intimidation of the pilot, and the Government, on the complaint of the pilot, could prosecute under this section of the act. It is not enough to say that the provisions of the act will be wisely administered in order to preclude any such interpretation—petitioner's present plight stands in mute refutation of such an argument.

It is because of this possible breadth of application, unfettered or illumed by standards, that this section is unconstitutionally vague. Granted that the "safety of the airlanes requires that pilots of all crafts, commercial or private, be free from harassment or intimidation during the flight" (Opp. 6). It is equally important that the pilot and his passengers be on

notice as to what conduct occurring in these airlanes is or is not unlawful. This statute applied in this type situation does *not* provide that notice and is therefore unconstitutionally vague.

This Court should grant this petition and resolve the manifest confusion surrounding the meaning and application of this section of the act, in order to guide not only the public in their aviation conduct, but also the Government and the courts in the prosecution and interpretation of the act.

CONCLUSION

For all of the reasons developed herein and in the petition for certiorari, petitioner respectfully prays that this Court cause the writ to issue. Upon full consideration by this Court, petitioner further prays that the case either be dismissed because of the unconstitutionality of Section 1472(j), or because private aircraft were not intended by Congress to be covered by such section. If the Court should not so find, petitioner prays alternatively that the decision instead be reversed because of the substantive and procedural errors committed by the trial court, and sent back for a new trial.

Respectfuly submitted,

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